

TERMS AND CONDITIONS OF SUPPLY – TRIVANTAGE GROUP OF COMPANIES

The following Terms and Conditions govern all Orders placed by the Buyer and will be incorporated into each Contract entered into between the Buyer and the Company.

1. Definitions.

In these Terms and Conditions:-

- 1.1. **Amount Payable** means, at any time, all amounts payable by the Buyer to the Company at that time (whether or not those amounts have become due for payment) in connection with the Contract including any invoiced amount, interest, fees, costs or expenses.
- 1.2. **Approval** means any approval, authorisation, certificate, consent, determination, exemption or permit of any Government Authority.
- 1.3. **Business Day** means:
 - 1.3.1. for receiving a notice under **clause 25**, a day that is not a Saturday, Sunday, public holiday or bank holiday in the place where the notice is received; and
 - 1.3.2. for all other purposes, a day that is not a Saturday, Sunday, bank holiday or public holiday in Victoria, Australia.
- 1.4. **Buyer** means the person to whom a Quotation issued by the Company is addressed. In the event that no Quotation is issued, **Buyer** means the person to whom Goods and/or Services are supplied or are to be supplied by the Company.
- 1.5. **Buyer IP** means any Intellectual Property Right of the Buyer (or licensed to the Buyer by a third party) which is in existence at the Commencement Date or comes into existence after the Commencement Date independently of the Contract.
- 1.6. **Change in Law** means:
 - 1.6.1. the adoption, enactment or application to the Company of any Relevant Law not existing, foreseeable or otherwise applicable to the Company on the Commencement Date; or
 - 1.6.2. any change in a Relevant Law or the application or interpretation of a Relevant Law after the Commencement Date,in either case that materially and adversely affects (in time and/or cost) the ability of the Company to perform its obligations under the Contract
- 1.7. **Commencement Date** means the date the parties enter into a Contract in accordance with **clause 4.7**.
- 1.8. **Company** means the company (being Trivantage Pty Ltd ACN 166 668 337 or one of its Related Bodies Corporate which accepts the Buyer's Order.
- 1.9. **Company IP** means any Intellectual Property Rights of the Company (or licensed to the Company by a third party) which is in existence at the Commencement Date or comes into existence after the Commencement Date other than in connection with the Contract.
- 1.10. **Confidential Information** means any information provided by the Buyer to the Company:
 - 1.10.1. which the Buyer has identified as confidential; or
 - 1.10.2. the Company ought reasonably to know is confidential, but excludes any confidential information of the Buyer that:
 - 1.10.2.1. is in or becomes part of the public domain other than through a breach of the Contract by the Company; or
 - 1.10.2.2. was already in the Company's possession at the time of receipt from the Buyer without any obligation of confidentiality to the Buyer.
- 1.11. **Contract** means:
 - 1.11.1. any contract to which these Terms and Conditions are expressed to form part; or
 - 1.11.2. for the supply of Goods or Services pursuant to an Order, the contract (which includes these Terms and Conditions) formed for the supply of Goods or Services to the Buyer upon the issue of an Order Confirmation.

- 1.12. **Credit Account Application** means the document by which a Buyer applies to the Company for a credit account.
- 1.13. **Defaulting Party** means a party subject to an insolvency event in accordance with **clause 24**.
- 1.14. **Delay Event** means:
- 1.14.1. a Force Majeure Event;
 - 1.14.2. a breach of this agreement by the Buyer; and
 - 1.14.3. a delay attributable to any act or omission of the Buyer or any other contractor or sub-contractor of the Buyer including a delay in the performance of works, providing instructions, giving consent or providing access to any site to enable the performance of the Services or delivery of the Goods.
- 1.15. **Delivery Claim** has the meaning given in **clause 14.2**.
- 1.16. **Design Services** means the undertaking of design or design and construct services by the Company.
- 1.17. **Developed IP** means all Intellectual Property Rights created, discovered or otherwise brought into existence in the course of the performance of the Contract.
- 1.18. **Disclosing Party** means a party whose Confidential Information is disclosed, communicated or delivered or otherwise made known to the other party.
- 1.19. **Force Majeure Event** means any event or circumstance which is beyond the reasonable control of the affected party and which results in or causes the failure of that party to perform any of its obligations under the Contract.
- 1.20. **Goods** means any goods supplied or to be supplied by the Company to the Buyer pursuant to the Contract, including goods supplied by way of hire.
- 1.21. **Governing Jurisdiction** means, unless otherwise stated in the Contract, the state of Victoria.
- 1.22. **Government Authority** means any Federal, State or local government (including any local council), and any agency, department, directorate or instrumentality thereof, including any independent regulator deriving power from statute, within Australia or elsewhere.
- 1.23. **Guarantor** means each person, if any:
- 1.23.1. specified as a guarantor in the Buyer's Credit Account Application; or
 - 1.23.2. who agrees in writing to guarantee the Buyer's performance of the Contract, or any part of the Contract.
- 1.24. **Insolvency Event** means any of the following events in respect of any party:
- 1.24.1. the party disposes of the whole or part of its assets, operations or business other than in the ordinary course of business;
 - 1.24.2. the party ceases to carry on business or is deregistered;
 - 1.24.3. the party ceases to be able to pay its debts as they become due;
 - 1.24.4. any step is taken by a mortgagee to take possession or dispose of the whole or part of the party's assets, operations or business;
 - 1.24.5. any step is taken to enter into any arrangement between the party and its creditors;
 - 1.24.6. any step is taken to appoint a receiver, a receiver and manager, a trustee in bankruptcy, a provisional liquidator, an administrator or other like person to the whole or part of the party's assets, operations or business;
 - 1.24.7. where the party is a partnership, any step is taken to dissolve that partnership or a partner dies; or
 - 1.24.8. where the party is an individual, the party dies.
- 1.25. **Installation Location** means the location at which the Company will carry the Installation Services for the Buyer.

- 1.26. **Installation Services** means the installation of Goods at the Installation Location by the Company.
- 1.27. **Intellectual Property Rights** means any and all intellectual property rights granted by law or equity from time to time, including copyright and related rights, designs, patents, trademarks, trade names and service marks, obligations of confidentiality and rights to use and protect the confidentiality of confidential information, know-how, moral rights, business names, domain names, rights in get-up and trade dress, goodwill and the right to sue for passing off, rights to inventions, and all other rights in intangible property including rights of present and future intangible property and all similar rights in any part of the world including any rights to claim priority and, where those rights are obtained or enhanced by registration, any registration, renewal or extension of those rights and applications and rights to apply for and be granted those registrations, renewals or extensions.
- 1.28. **IpsO Facto Law Reform** means the law reform outlined in the *Corporations Amendment (Stay on Enforcing Certain Rights) Regulations 2018* (Cth) which prevents a party from enforcing a provision to terminate or amend a contract because the counterparty enters into voluntary administration, receivership or a scheme of arrangement to avoid being wound up in insolvency.
- 1.29. **Loss** means damage, loss, cost, expense, suit, charge, action, right or action, or liability (whether actual or contingent).
- 1.30. **Maintenance Services** means the undertaking of maintenance or repair services by the Company.
- 1.31. **Order** means an order placed by the Buyer with the Company for the purchase of Goods or Services, whether made in writing, electronically (including by email) or verbally.
- 1.32. **Order Confirmation** means the confirmation of an Order issued by the Company to the Buyer.
- 1.33. **PPSA** means the *Personal Property Securities Act 2009* (Cth).
- 1.34. **Price** means the price payable for the Supply as agreed between the Company and the Buyer in accordance with **clause 11** of these Terms and Conditions.
- 1.35. **Privacy Laws** means the data protection and information privacy laws in Australia, including the *Privacy Act 1988* (Cth).
- 1.36. **Quotation** means a written quotation by the Company setting out the proposed terms of a Supply.
- 1.37. **Receiving Party** means a party who is in receipt of Confidential Information of the other party.
- 1.38. **Related Body Corporate** has the same meaning as in the *Corporations Act 2001* (Cth).
- 1.39. **Relevant Law** means any present and future applicable law including legislation, ordinances, regulations, codes, by-laws, orders, judgments, ordinances and other subordinate legislation, in force from time to time in any applicable jurisdiction that may be applicable in connection with the performance of the Supply.
- 1.40. **Scope of Work** means the entire Works and requirements being performed by the Company under the Contract, as may be amended pursuant to the Contract from time to time.
- 1.41. **Services** means any works or services supplied or to be supplied by the Company to the Buyer pursuant to the Contract and may include Installation Services, Maintenance Services, Design Services or the undertaking of Works.
- 1.42. **Specification** means any written specification document in respect of the Goods or Services which has been incorporated in the Contract.
- 1.43. **Subcontractor** means an agent, supplier or subcontractor engaged by the Company to perform any part of the Supply.
- 1.44. **Supply** means the supply of Goods or Services pursuant to the Contract.
- 1.45. **Terms and Conditions** means these terms and conditions of supply.
- 1.46. **Variation** has the meaning given in **clause 21.1**.
- 1.47. **Works** means the entire works being performed by the Company under the Contract.

2. Interpretation.

- 2.1. In the Contract, headings and bold text are for ease of reference only and do not affect the interpretation of this agreement and, unless the context otherwise requires:
 - 2.1.1. the singular includes the plural and vice versa;
 - 2.1.2. another grammatical form of a defined word or expression has a corresponding meaning;
 - 2.1.3. a reference to a clause, paragraph or schedule is to a clause or paragraph of or schedule to the Contract and a reference to the Contract includes any schedule or annexure;
 - 2.1.4. a reference to a document or instrument, includes the document or instrument as novated, altered, supplemented or replaced from time to time;
 - 2.1.5. subject to **clause 25**, a reference to time is to Victorian time;
 - 2.1.6. a reference to a party to the Contract, and a reference to a party to a document includes the party's executors, administrators, successors and permitted assigns and substitutes;
 - 2.1.7. a reference to a person includes a natural body, partnership, body corporate, association, governmental or local authority or agency or other entity;
 - 2.1.8. a reference to a statute, ordinance, code or other law includes regulations and other instruments under it and consolidations, amendments, re-enactments or replacements of any of them;
 - 2.1.9. the meaning of general words is not limited by specific examples introduced by including, for example or similar expressions; and
 - 2.1.10. a rule of construction does not apply to the disadvantage of a party because the party was responsible for the preparation of the Contract or any part of it.
- 2.2. If a day on or by which an obligation must be performed or an event must occur is not a Business Day, the obligation must be performed or the event must occur on or by the next Business Day.

3. Application of these Terms and Conditions.

- 3.1. The Terms and Conditions apply to every Order, unless otherwise agreed in writing by the Company. Placement of an Order by the Buyer is conclusive evidence of the Buyer's acceptance that the Terms and Conditions apply and are binding on the Buyer.
- 3.2. The Contract constitutes the entire agreement between the Buyer and the Company with respect to an Order. All prior negotiations, proposals, previous dealings, correspondence, trade custom and/or trade usage are superseded by and will not affect the interpretation of the Contract.
- 3.3. Any purported incorporation of other standard terms and conditions by the Buyer is void and of no effect, unless specifically identified in the Contract.
- 3.4. Where there is any discrepancy between the Terms and Conditions and those that may be included in or implied by any document forming part of any enquiry, order or contract, the Terms and Conditions will prevail, except in so far as they are expressly varied by the Company in writing or otherwise by law.

4. Quotations, Orders and Contract Formation.

- 4.1. A Quotation issued by the Company to the Buyer is an offer to perform the Supply and will not create any contract except in accordance with **clause 4.7**.
- 4.2. Unless the Quotation states otherwise, the Quotation is provided on the basis that the Supply will be subject to these Terms and Conditions.
- 4.3. The Company may withdraw, revoke or vary a Quotation at any time prior to its acceptance.
- 4.4. Unless otherwise stated in writing by the Company, all Quotations will automatically lapse thirty (30) days after the date of the Quotation.

- 4.5. The Buyer may submit Orders to the Company from time to time, but the Company may accept or refuse any Order in its absolute discretion, even if the Order is placed in response to a Quotation.
- 4.6. There is no obligation on the Company to enquire as to the authority of any person placing an Order on behalf of the Buyer.
- 4.7. An Order is accepted by the Company and a Contract is made when the Buyer receives an Order Confirmation from the Company or the Company commences delivery of Goods or the provision of Services identified in the Order, whichever occurs first.
- 4.8. Any purported cancellation by the Buyer, to which the Company has not consented, may be treated by the Company as a repudiation of the Contract by the Buyer.

5. General Obligations.

- 5.1. The Company will:
 - 5.1.1. subject to the terms of the Contract, perform the Supply to the standard of reasonable care and skill to be expected of contractors who regularly act in the capacity in which the Company is engaged and who possess the knowledge, skill and experience of a contractor to act in that capacity; and
 - 5.1.2. carry out the Supply on the basis of information available to the Company at the time when the Supply is being carried out. The Company will not take any responsibility, nor accept any liability, for Loss arising out of matters relevant to the Supply that arise due to circumstances that become known to the Company after completion of the Supply.
- 5.2. The Buyer must:
 - 5.2.1. pay the Price to the Company in consideration for the Supply in accordance with **clause 11**;
 - 5.2.2. provide the Company with any technical information, approval or drawings or other information reasonably required by the Company in carrying out its obligations regarding the Supply; and
 - 5.2.3. provide all reasonable support and co-operation reasonably requested by the Company in connection with the Supply.

6. Supply of Services.

- 6.1. This **clause 6** applies to the extent the Supply includes Services.
- 6.2. The Company agrees to provide the Services in accordance with the Contract.
- 6.3. The Company must do and provide all things reasonably necessary for the provision of the Services to the Buyer in accordance with:
 - 6.3.1. the description of the Services in the Contract; and
 - 6.3.2. all Relevant Laws and approvals, any relevant Australian standards and other standards set out in the Contract relevant to the performance of the Services.
- 6.4. The Company must use all reasonable endeavours to perform the Services by the date specified in the Order Confirmation (**Completion Date**) or as otherwise agreed in writing by the parties and subject to any extension of time under the Contract. If no Completion Date is specified or agreed, the Company must use reasonable endeavours to undertake the Services in a timely manner.
- 6.5. The Company will be entitled to an extension of the Completion Date by a period of not less than the duration of a Delay Event if it is likely to be delayed in achieving the Completion Date.
- 6.6. Within a reasonable time after the Company becomes aware of a Delay Event, the Company must notify the Buyer of the Delay Event and the new date for completion of the Services.
- 6.7. If a Delay Event of the type described in **clauses 1.14.2 or 1.14.3** occurs and the Company incurs additional costs in relation to such event, the Company is entitled to claim, and the Buyer must reimburse the Company for, the actual costs reasonably incurred by the Company in relation to the delay.

- 6.8. Unless the Contract provides otherwise, the Buyer is responsible for:
- 6.8.1. obtaining and maintaining all Approvals in connection with the Works;
 - 6.8.2. ensuring that the Company has clear and uninterrupted access to any site to enable the performance of the Services;
 - 6.8.3. securing any such site during the performance of the Services;
 - 6.8.4. obtaining all necessary insurances for the Goods or Services (including contract works and public liability insurance) during the performance of the Services; and
 - 6.8.5. notifying the Company of the precise location of all hidden services at any site of the Supply.

7. Supply of Goods.

- 7.1. This **clause 7** applies to the extent the Supply includes Goods.
- 7.2. The Company agrees to Supply the Goods in accordance with the Contract.
- 7.3. The Company will make all reasonable efforts to have the Goods delivered to the Buyer or its designated agent not later than the time set out in the Contract or otherwise quoted by the Company in writing. If no time is stated or quoted, the Company must use reasonable endeavours to deliver the Goods in a timely manner.
- 7.4. Unless otherwise stated in writing, times quoted for delivery by the Company are given in good faith and are estimates only. The Buyer will not be relieved of any obligation to accept or pay for Goods by reason of any delay in delivery.
- 7.5. The Company will not be liable for:
- 7.5.1. any damage or loss due to unloading or packaging; or
 - 7.5.2. damage to property caused upon entering premises to deliver the Goods, except to the extent that such damage was caused by the negligent act or omission of the Company.
- 7.6. Unless the Contract provides otherwise:
- 7.6.1. the Price of the Goods is on an ex-works basis for collection by the Buyer from the Company's premises; and
 - 7.6.2. if the Company agrees, in its absolute discretion, to arrange delivery to another location, the Buyer must bear all freight, handling and insurance charges, which charges the Company may add to any invoice to the Buyer (or may invoice separately to the Buyer).
- 7.7. In all circumstances and whatever the agreed method or place of delivery, the Buyer will be responsible at its own cost for unloading the Goods, or for arranging for a suitable means of unloading the Goods, from the relevant delivery vehicle. The Buyer will indemnify the Company against any loss, liability, costs or expenses incurred by the Company in relation to the unloading of the Goods.
- 7.8. If the Buyer fails to accept delivery of the Goods or give proper instructions to the Company for their delivery within fourteen (14) days after receiving notification in writing from the Company that the Goods are ready for delivery, the Buyer will be liable to pay to the Company on demand all reasonable costs for storage, protection and insurance of the Goods after expiration of such fourteen (14) day period. The Company reserves the right to store such Goods at a location of its choosing.
- 7.9. No defect or claim in respect of Goods delivered will entitle the Buyer to reject delivery of other Goods, which are not subject to any defect or claim, delivered as part of the Order.
- 7.10. Legal and equitable title in the Goods sold by the Company to the Buyer remains with the Company until delivery. The passing of title is conditional on the Buyer fulfilling all of its obligations pursuant to the Contract, including payment in full of the Price and all other amounts owing to the Company by the Buyer.
- 7.11. The Company and the Buyer agree that, until property and ownership (including legal and equitable title) of the Goods has passed to the Buyer:

- 7.11.1. the Buyer will not supply any of the Goods to any person outside its ordinary or usual course of business;
- 7.11.2. the Buyer will not allow any person to have or acquire any security interest in the Goods;
- 7.11.3. the Buyer will not create any absolute or defeasible interest in the Goods in relation to any third party except as may be authorised by the Company;
- 7.11.4. the Buyer must not remove, deface or obliterate any identifying mark, number or other indicia on any of the Goods;
- 7.11.5. where the Buyer is in actual or constructive possession of the Goods:
 - (a) the Buyer holds the Goods as fiduciary bailee and agent for the Company;
 - (b) after giving reasonable notice to the Buyer, the Company will be entitled to enter upon the Buyer's premises at any reasonable time to inspect the Goods;
 - (c) the Buyer will not deliver the Goods, or any document of title to the Goods, to any person except as directed or approved by the Company in writing;
 - (d) the Buyer must store the Goods separately and in a manner that enables the Goods to be identified and cross-referenced to particular invoices issued to the Buyer by the Company; and
 - (e) the proceeds of any Goods sold must be kept in a separate account by the Buyer and must not be mixed with any other moneys, including funds of the Buyer;
- 7.11.6. the Buyer acknowledges that if it should mix the Goods with other products or items such that the Goods are no longer separately identifiable, then the Buyer and the Company will be owners in common of the new product; and
- 7.11.7. the Buyer has no right to claim any interest in the Goods to secure any amount or obligation the Company owes to the Buyer.
- 7.12. Unless the Contract provides otherwise, the Goods are at the Buyer's risk from the time at which they are dispatched to the Buyer or its nominee and the Buyer must insure (and keep insured) the Goods for their full insurable value with an insurer licensed or authorised to conduct the business of insurance in the place where the Goods will be stored.
- 7.13. Unless the Contract provides otherwise, the Buyer is responsible for obtaining and maintaining all Approvals required to own, possess, use or operate the Goods.

8. Installation of Goods.

- 8.1. This **clause 8** applies if the Contract specifies that the Goods are to be installed or the Company otherwise agrees in writing to perform Installation Services.
- 8.2. The Company agrees to:
 - 8.2.1. make all reasonable efforts to perform the Installation Services at the Installation Location at the time set out in the Contract or otherwise quoted by the Company, noting that any such time is an estimate only;
 - 8.2.2. notify the Buyer as soon as reasonably practicable of any anticipated material delays in carrying out the Installation Services; and
 - 8.2.3. supply all tools, equipment and materials to complete the Installation Services, except as otherwise provided in the Contract.
- 8.3. The Buyer must:
 - 8.3.1. notify the Company in writing of any restrictions on access to the Installation Location or hazards at or adjacent to the Installation Location that might reasonably be expected to affect the performance of the Installation Services;
 - 8.3.2. provide in a timely manner all information reasonably requested by the Company in relation to the Installation Location;
 - 8.3.3. provide in a timely manner any deliverables, plant, equipment or materials identified in the Contract as being required to be supplied by the Buyer;

8.3.4. notify the Company in writing within seven (7) days after completion of the Installation Services or discovery of the alleged defect, whichever occurs first, of any alleged defect or deficiency in the performance of the Installation Services.

8.4. Unless otherwise agreed in writing by the Company:

8.4.1. the structural soundness of the services and buildings at the Installation Location, and the suitability of any structural alterations or additions to any such equipment, services or buildings necessary for the installation of the Goods, is the Buyer's responsibility;

8.4.2. the Buyer must provide all services reasonably necessary for the installation of the Goods, including water, electricity, compressed air, gas, drainage and sanitation at no cost and in a timely manner; and

8.4.3. the Buyer must allow or procure that the Company may undertake the Installation Services continuously and without disruption by the Buyer or any third party, failing which, the Company may charge the Buyer for all costs and expenses resulting from delay or disruption.

9. Design Services.

9.1. Unless, and except to the extent that, the Contract expressly requires the Company to undertake the design of any part of the Works, the Company gives no warranty, and accepts no liability for, design.

9.2. The remainder of this **clause 9** applies if, and to the extent, the Contract expressly requires the Company to undertake the design of any part of the Works.

9.3. The Company must:

9.3.1. provide the Design Services in accordance with the Contract;

9.3.2. use reasonable endeavours to ensure the Design Documents meet the requirements of the Contract, including any applicable Specifications, and contain sufficient detail to enable the undertaking of the Works; and

9.3.3. allow the Buyer to access partially completed Design Documents when reasonably requested and upon reasonable prior notice.

9.4. The Buyer must:

9.4.1. provide in a timely manner all information reasonably requested by the Company in relation to the Design Services;

9.4.2. promptly, and in accordance with any agreed timeframes and programs, review and provide feedback to the Company in respect of any Design Documents provided to the Buyer for review;

9.4.3. provide written reasons for any rejection of any Design Documents submitted to it for approval; and

9.4.4. otherwise co-operate with the Company in good faith during the development of any designs to ensure the timely completion of all Design Services.

10. Maintenance Services.

10.1. This **clause 10** applies if the Contract specifies that the Supply includes Maintenance Services or if the Company otherwise agrees in writing to perform the Maintenance Services.

10.2. The Company must provide the Maintenance Services.

10.3. The Buyer must except as otherwise provided in the Contract:

10.3.1. notify the Company in writing before the commencement of the Maintenance Services of any known defects in the plant, equipment or goods being serviced or any hazards at, or adjacent to, the site at which the Maintenance Services are to be performed;

10.3.2. provide in a timely manner all information reasonably requested by the Company in relation to the location at which the maintenance services are to be performed;

10.3.3. provide in a timely manner any deliverables, plant, equipment or materials identified in the Contract as being required to be supplied by the Buyer;

- 10.3.4. notify the Company in writing within seven (7) days after completion of any Maintenance Services or discovery of the alleged defect, whichever occurs first, of any alleged defect or deficiency in the performance of the Maintenance Services;
 - 10.3.5. provide all services reasonably necessary for Maintenance Services, including water, electricity, compressed air, gas, drainage and sanitation at no cost and in a timely manner;
 - 10.3.6. provide all access reasonably required by the Company to perform the Maintenance Services; and
 - 10.3.7. allow or procure that the Company may undertake the Maintenance Services continuously and without disruption by the Buyer or any third party, failing which, the Company may charge the Buyer for all costs and expenses resulting from delay or disruption.
- 10.4. Except as otherwise provided in the Contract, the Buyer acknowledges that the Price of the Maintenance Service does not include the cost of any replacement parts, materials and equipment.

11. Pricing.

- 11.1. The Buyer must pay the Price at the time and in the manner set out in the Contract.
- 11.2. The Price charged will be:
 - 11.2.1. the price set out in the Order Confirmation; or
 - 11.2.2. if there is no Order Confirmation or the Order Confirmation does not set out a price, the price set out in the most recent Quotation issued by the Company (if any); or
 - 11.2.3. if neither 11.2.1 or 11.2.2 applies, the price agreed in writing by the Company and the Buyer; or
 - 11.2.4. if none of the above applies, the Company's current list price for the Supply, subject to any adjustment in accordance with the Contract.
- 11.3. Unless expressly stated otherwise the Price excludes:
 - 11.3.1. fees, duties (e.g. stamp duty), taxes (e.g. GST), surcharges and all other imposts of any government authority ('governmental imposts'); and
 - 11.3.2. sea freight, duty, customs clearance, which will all be charged at cost plus 5% handling charge if applicable.
- 11.4. Unless specified to the contrary in the Contract, the Supply does not include, and no allowance has been made by the Company in the Price for:
 - (a) any physical conditions on site which differ from the physical conditions which could reasonably have been anticipated by the Company, including hidden services or ground conditions;
 - (b) Changes in Law; or
 - (c) obtaining Approvals by the Company.
- 11.5. If any of the circumstances identified in **clause 11.4** occur and result in an increase in the cost to the Company of performing the Supply, and the Contract does not state otherwise, the Company is entitled to make a reasonable adjustment to the Price to recover the additional costs.

12. Invoicing and Payment.

- 12.1. Subject to **clause 12.11 and 12.12**, unless the Contract states otherwise, the Buyer must pay the Price not later than thirty (30) days following the date of the invoice.
- 12.2. The Buyer must pay the Price in the currency in which it is invoiced.
- 12.3. Time for payment is of the essence.
- 12.4. Where the Buyer has defaulted in its payment obligations under the Contract, any amounts owing by the Buyer to the Company for any Goods or Services supplied pursuant to the Contract may be offset by the Company against any amount payable by the Company to the Buyer under any other contract.

- 12.5. **Clause 12.4** does not preclude or otherwise limit the rights of the Company to pursue legal remedies in the event of default by the Buyer.
- 12.6. The Company may charge a surcharge on payments made by credit card to reimburse the cost of any bank or processing charges incurred by the Company in respect of the payment.
- 12.7. To the maximum extent permitted by law, the Buyer will be liable for all costs incurred with the recovery of any unpaid invoiced amounts, including without limitation legal and collection agents' fees, court costs, interest and the Company's fees for time incurred with the recovery process.
- 12.8. The Buyer is not entitled to set off against, or deduct from the Price, any sums owed or claimed to be owed to the Buyer by the Company, nor is the Buyer entitled to withhold payment of any invoice because part of that invoice is in dispute.
- 12.9. If the Buyer does not pay any amount owing to the Company by the due date for payment, the Company may charge default interest on the unpaid amount at three percent above the rate specified from time to time under section 2 of the *Penalty Interest Rates Act 1983 (Vic)*, calculated on a daily basis from the due date until payment is received in full (after as well as before judgment).
- 12.10. Any agreement by the Company to grant the Buyer credit has been or will be made on the basis of a Credit Account Application and any additional information (including references) required by the Company.
- 12.11. If the Company approves the Buyer's Credit Account Application and grants the Buyer credit, the Buyer must pay the Price within the period of credit and in accordance with any agreed credit terms.
- 12.12. Until the Company grants the Buyer credit by notice in writing, or if the Company withdraws, suspends or limits credit (which it may do at any time and for any reason, in its absolute discretion), the Company will only Supply the Goods or Services to the Buyer on the basis of payment by cash in advance.
- 12.13. By completing a Credit Account Application and applying for credit with the Company, the Buyer agrees to be bound by the Terms and Conditions for each Supply made by the Company to the Buyer unless and until the Company and the Buyer agree in writing to the contrary.
- 12.14. If the Buyer holds a credit account with the Company, the Buyer must immediately notify the Company in writing of any change in the shareholding or ownership of the Buyer or any material change in the Buyer's financial position or any other information provided by the Buyer in the Credit Account Application.

13. **GST.**

- 13.1. In this **clause 13**, a word or expression defined in the GST Law has the meaning given to it in that law.
- 13.2. All amounts payable under a Contract are exclusive of GST.
- 13.3. If a party makes a supply under or in connection with a Contract in respect of which GST is payable, the consideration for the supply but for the application of this **clause 13.3 (GST exclusive consideration)** is increased by an amount equal to the GST exclusive consideration multiplied by the rate of GST prevailing at the time the supply is made unless that consideration is stated to already include GST.
- 13.4. If a party must reimburse or indemnify another party for a loss, cost or expense, the amount to be reimbursed or indemnified is first reduced by any input tax credit the other party is entitled to for the loss, cost or expense, and then increased in accordance with **clause 13.3**.
- 13.5. Each party agrees to do all things, including providing tax invoices and other documentation, that may be necessary or desirable to enable or assist the other party to claim any input tax credit, adjustment or refund in relation to any amount of GST paid or payable in respect of any supply made under or in connection with a Contract.
- 13.6. A party need not make a payment for a taxable supply made under or in connection with a Contract until it receives a tax invoice for the supply to which the payment relates.

14. Delivery Claims.

- 14.1. The Buyer must inspect all Goods received as soon as practicable following delivery.
- 14.2. The Buyer must, within two (2) Business Days of completion of the Supply (time being of the essence), notify the Company of any error, omission, shortage in quantity or damage to the Goods delivered (**Delivery Claim**).
- 14.3. The Buyer must provide such substantiation of any Claim as reasonably requested by the Company and must assist the Company to investigate the Delivery Claim.
- 14.4. The Buyer must allow the Company or its nominee to inspect the alleged error, omission, shortage in quantity or damage within a reasonable time of receiving the Delivery Claim.
- 14.5. The Company will endeavour to rectify any error, omission, shortage in quantity or damage, properly notified and verified in accordance with this **clause 14**, as soon as reasonably practicable after receiving the Delivery Claim but will not be liable for any delay in respect of such rectification.
- 14.6. If the Buyer fails to give notice in accordance with **clause 14.2**, the Company will be deemed to have fulfilled the contract and no Delivery Claim by the Buyer need be recognised by the Company.

15. Warranties and Defects.

- 15.1. The Company warrants that, except as otherwise stated in the Contract:
 - 15.1.1. the Company is the legal and beneficial owner of the Goods and has the right to sell the Goods to the Company free from all mortgages, charges, encumbrances, liens and other third party rights and claims;
 - 15.1.2. it will perform the Services in accordance with all Relevant Laws;
 - 15.1.3. the Goods and Services will be free from defects in material and workmanship under normal use for a period of twelve (12) months (**Warranty Period**); and
 - 15.1.4. the Goods conform with the Specification and the Services comply with the Buyer's specified requirements in the Contract.
- 15.2. Goods purchased by the Company from a third party either for incorporation into the equipment manufactured by the Company or for sale to the Buyer are subject to warranty as applicable from the supplier to the Company. To the maximum extent permitted by law, the Company does not give any warranty with regard to such goods, but will provide reasonable assistance to the Buyer, at the Buyer's cost, to enforce the Buyer's rights against the supplier.
- 15.3. The Buyer must notify the Company of any Goods or Services that it believes do not meet the warranties in **clause 15.1** and allow the Company or its nominee to inspect the Goods or results of the Services within a reasonable time after such notification.
- 15.4. If, within the Warranty Period, the Company agrees that the Goods or Services do meet the warranties in **clause 15.1**, and provided the Buyer will return any Goods to the Company, and the Company must, at its option:
 - 15.4.1. repair or replace the defective goods or pay the cost of the repair or replacement of those Goods; and/or
 - 15.4.2. re-perform the defective Services or pay the cost of their reperformance.
- 15.5. The Company makes no other warranty to any person (including the Buyer) in relation to the Goods or Services except those expressly set out in the Contract and those warranties which cannot be specifically excluded under law and the Company expressly excludes all other terms, conditions, warranties, undertakings, inducements or representations, whether expressly or implied or implied by statute.

16. Insurance.

- 16.1. The Company must maintain with a reputable insurance company throughout the term of the Contract:
 - 16.1.1. public liability insurance written on an occurrence basis providing cover for an amount not less than \$20,000,000;

- 16.1.2. workers' compensation insurance appropriate to its activities in the form and amount required by law; and
- 16.1.3. if the Supply includes Design Services, professional indemnity insurance for an amount of \$5,000,000 per claim and in the annual aggregate.

16.2. The Company must provide evidence that it holds the insurance required under clause 16.1 whenever reasonably requested by the Buyer.

17. Personal Property Securities Act.

17.1. In this **clause 17**, terms defined in the PPSA have the meaning given in the PPSA, unless the context requires otherwise.

17.2. The Buyer acknowledges and agrees that, with respect of the Goods identified in the Contract or otherwise supplied to the Buyer, the Contract constitutes a security agreement and that the Company may register a financing statement in respect of the security interest provided by the Contract.

17.3. The Buyer grants to the Company a security interest in the Goods supplied to the Buyer by the Company to secure payment of the Amount Payable. The security interest:

17.3.1. extends to and continues in all proceeds; and

17.3.2. is a purchase money security interest to the extent to which it secures payment of the unpaid Price.

17.4. The Buyer must:

17.4.1. promptly do anything required by the Company to ensure the Company's security interest is a perfected security interest and has priority over all other security interests in the Goods;

17.4.2. not do or permit anything to be done that may result in the purchase money security interest granted to the Company ranking in priority behind any other security interest;

17.4.3. not cause or knowingly permit any person to take a security interest over, or to register a financing statement in relation to, the Goods without the prior written consent of the Company; and

17.4.4. immediately notify the Company if it becomes aware of any person taking steps to register a financing statement in relation to the Goods.

17.5. The Buyer:

17.5.1. waives the right under the PPSA to receive a copy of the verification statement verifying registration of a financing statement or a financing charge statement relating to a security interest created under the Contract;

17.5.2. waives any right it may have under section 115 of PPSA upon enforcement;

17.5.3. to the fullest extent permitted by the PPSA, contracts out of its rights to receive any other notice or statement under any other provision of the PPSA;

17.5.4. agrees to pay all costs incurred by the Company in registering and maintaining a financing statement (including registering a financing charge statement) on the PPSR or enforcing or attempting to enforce the security interest created by the Contract including executing subordination agreements; and

17.5.5. is responsible for the full costs incurred by the Company (including actual legal fees and disbursements on a solicitor and client basis) in obtaining an order pursuant to section 182 of the PPSA.

17.6. If the Buyer defaults in the performance of any obligation to the Company under the Contract or any other agreement for the Company to provide Goods to the Buyer, the Company may enforce its security interest in any Goods by exercising all or any of its rights under the Contract or the PPSA.

18. Liability and Indemnities.

18.1. Nothing in the Contract excludes, restricts or modifies any terms, conditions or warranties or the Company's liability for them which are imposed or implied by any statute, including but not limited to the *Competition and Consumer Act 2010* (Cth), and which by statute cannot be

excluded, restricted or modified. Limitations and exclusions are made only to the extent that the Company may legally do so.

- 18.2. Subject to **clause 18.1**, the Company's liability for any kind of loss or damage suffered by the Buyer in connection with the Contract, whether in contract, negligence or other tort, misrepresentation, breach of any statutory or equitable duty, or otherwise, and whether the Company's act or omission is wilful or otherwise, is excluded and/or limited (as the case may be) as set out in **clause 18**.
- 18.3. The Company accepts unlimited liability for personal injury or death to the extent that it directly results from the Company's negligence, but subject to the contributory liability of any other person.
- 18.4. Subject to **clauses 18.1** and **18.3**, to the maximum extent permitted by law, the Buyer acknowledges and agrees the Company's liability to the Buyer (and any party claiming through the Buyer against the Company) for any claim for loss or damages (including legal expenses) made in connection with the Contract whether in contract, tort (including negligence), under statute, in equity or otherwise will be limited as follows:
 - 18.4.1. for any liability for Goods that are claimed to be defective or deficient (whether arising from those goods not meeting the Specification or otherwise), the Company's liability is limited to the cost of repair or replacement of those Goods as soon as reasonably practicable, or repayment to the Buyer of the Price of those Goods, at the Company's election; and
 - 18.4.2. for any liability for Services forming part of the Supply or otherwise provided by, or on behalf of, the Company, not meeting the Scope of Work or Specification or otherwise claimed to be defective or deficient the Company's liability is limited to the provision of the Services again or the payment of the price of having the Services provided again, at the Company's election.
- 18.5. To the maximum extent permitted by law, the Buyer acknowledges and agrees that the Company will not be liable for, and the Buyer waives any right it has to claim, any loss not arising naturally according to the usual course of things, any loss of income, loss of actual or anticipated profit, loss of production, loss of contract, loss of customers, goodwill, opportunity or business, or loss of data arising under or in connection with the Contract, whether in contract, tort (including negligence), under statute, in equity or otherwise.
- 18.6. Without limiting any other provision of this clause 18, the Company's aggregate liability arising out of or in connection with any delay in the performance of the Supply or completion of the Works, whether in the nature of liquidated damages or otherwise, is capped at 10% of the Price.
- 18.7. The Buyer acknowledges and agrees, subject to **clause 18.1** and to the maximum extent permitted by law, that any other liability falling outside the application of **clauses 18.3** or **18.4** above, for any loss or damage arising from or caused in any way by the Company, the Goods or Services or this Contract, is excluded.

19. Intellectual Property.

- 19.1. Subject to this **clause 19**, the Company IP remains vested in the Company.
- 19.2. The Buyer grants to the Company a non-exclusive, royalty-free, sub-licensable (to the Company's Personnel), revocable, non-transferable licence to use the Buyer IP for any purposes related to the supply or to perform the Company's obligations under the Contract.
- 19.3. The Buyer indemnifies the Company from and against all claims and losses and damages incurred by the Company as a direct or indirect result of any breach of a third party's Intellectual Property Rights as a result of the Company using or relying on any Specifications, drawing, design, production requirements or other materials or instructions furnished by the Customer in relation to the Supply or otherwise using the Buyer's IP in the manner set out in, or reasonably inferable from, the Contract.
- 19.4. All Company IP provided by the Company to the Buyer as part of the Supply remains the property of the Company and the Buyer warrants that it will not infringe those rights. Subject to the Buyer's payment of the Price in accordance with the Contract, the Company grants the Buyer a non-exclusive, royalty-free, revocable, non-transferable licence to use the Company IP for any purpose related to the use of the Goods or Services under, or as reasonably inferable from, the Contract and otherwise to receive the benefit of the Supply.

- 19.5. Except as stated otherwise in the Contract, all Developed IP will be the sole and exclusive property of the Company, and the Buyer hereby irrevocably assigns to the Company all right, title and interest in and to the Developed IP upon the creation of such Developed IP.
- 19.6. Subject to the Buyer's payment of the Price in accordance with the Contract and unless stated otherwise in the Contract, the Company grants to the Buyer a non-exclusive, royalty-free, sub-licensable (to the Buyer's Personnel), revocable, non-transferable licence to use the Developed IP for any purposes related to the use of the Goods or Services under or as reasonably inferable from, the Contract and otherwise to receive the benefit of the Supply.

20. Confidential Information.

- 20.1. The Company must:
 - 20.1.1. take all reasonable steps to safeguard the confidentiality of the Confidential Information; and
 - 20.1.2. not disclose, make public or use for purposes other than for the purposes of the Contract any Confidential Information of the Buyer without the prior written consent of the Buyer.
- 20.2. Any obligation of the Company under this **clause 20** will not be taken to have been breached if the confidential information was required to be disclosed by law or court order, provided that the Company, to the extent reasonably practicable, gives the Buyer prompt notice of the existence of such an obligation and makes a reasonable effort to otherwise protect the confidentiality of such information.

21. Variations to the Works.

- 21.1. The Buyer may, by written notice, request the Company to do any one or more of the following:
 - 21.1.1. increase, decrease or omit any part of the Works or the Supply;
 - 21.1.2. change the character or quality of any material or work (including a change in specified performance requirements or functional requirements);
 - 21.1.3. alter the program for the performance of the Works or the Supply; or
 - 21.1.4. perform additional work,
(Variation).
- 21.2. If the Buyer requests a Variation, the Company must consider the request in good faith and notify the Buyer in writing whether or not the Company is willing to perform the Variation, and if so, any cost and time implications of the proposed Variation.
- 21.3. A Variation will not be binding on the Parties unless and until:
 - 21.3.1. the Company has accepted the proposed Variation in writing; and
 - 21.3.2. the Company and the Buyer have agreed in writing any adjustment to the Price or the time form performance, or that no such adjustments are required.
- 21.4. Unless and until the requirements of clause 21.3 are satisfied, the parties remain bound by the Contract, without the Variation.

22. Privacy.

- 22.1. Each party must comply with its obligations under the Privacy Laws.
- 22.2. The Company will deal with personal information in accordance with its published privacy policy.

23. Subcontracting and Assignment.

- 23.1. The Company reserves the right to subcontract any part of the Supply without the Buyer's consent.
- 23.2. The Company may assign its rights or novate its rights or obligations under the Contract (in whole or in part) to any person without the consent of the Buyer.
- 23.3. The Buyer must not assign or otherwise transfer its rights under the Contract without prior notice to and consent from the Company, which consent must not be unreasonably withheld.

24. Termination.

- 24.1. The Company may terminate the Contract by written notice to the Buyer if:
- 24.1.1. the Buyer has not complied with the terms of payment pursuant to **clause 12**;
 - 24.1.2. the Buyer is subject to an Insolvency Event; or
 - 24.1.3. the Buyer is otherwise in breach of its obligations under the Contract and fails to remedy the breach within 10 Business Days after receipt of written notice from the Company requesting the breach be remedied.
- 24.2. The Buyer may terminate the Contract by written notice to the Company if:
- 24.2.1. the Company is subject to an Insolvency Event; or
 - 24.2.2. the Company is otherwise in breach of its obligations under the Contract and fails to remedy the breach within 10 Business Days after receipt of written notice from the Buyer requesting the breach be remedied.
- 24.3. **Clauses 24.1.2 and 24.2.1** do not apply if the Defaulting Party enters into voluntary administration, receivership or is subject to a scheme of arrangement, as contemplated by the Ipso Facto Law Reform. For clarity, this **clause 24.3** will only apply while the administration, receivership or scheme of arrangement is ongoing, and will cease in the event that the Defaulting Party is wound up.
- 24.4. Without limiting any other remedy available to the Company, to the maximum extent permitted by law:
- 24.4.1. the Buyer must pay for all parts of the Supply performed prior to the termination of the Contract; and
 - 24.4.2. if the Contract is terminated by the Company under **clause 24.1**, the Buyer must indemnify the Company from and against all liability, claims, costs and expenses, losses and damages incurred by the Company arising out of or in connection with the termination.

25. Services and Notices.

- 25.1. A notice, demand, consent, approval or communication under this agreement (**Notice**) must be:
- 25.1.1. in writing, in English and signed by a person duly authorised by the sender; and
 - 25.1.2. marked for the attention of the person, and hand delivered or sent by prepaid post or email to the recipient's address specified in the Parties section of this agreement, as varied by any Notice given by the recipient to the sender.
- 25.2. Communications by email need not be marked for the attention in the way required by **clause 25.1.2**. However, the email must state the first and last name of the sender. Communications sent by email are taken to be signed by the named sender.
- 25.3. A Notice given in accordance with **clause 25.1** takes effect when taken to be received (or at a later time specified in it), and is taken to be received:
- 25.3.1. if hand delivered, on delivery;
 - 25.3.2. if sent by prepaid post, six Business Days after the date of posting (or fourteen Business Days after the date of posting if posted to or from a place outside the country of delivery); or
 - 25.3.3. if sent by email, at the time the email was sent unless the sender receives an automated message that the email has not been delivered,

but if receipt is not on a Business Day or is after 5.00pm on a Business Day (in the time zone of the addressee), the Notice is taken to be received at 9.00am on the next Business Day.

26. Governing Law and Jurisdiction.

- 26.1. The Contract will be governed by and construed in accordance with the laws in force in the state in which the Order Confirmation is issued, or if no Order Confirmation is issued, Victoria.

26.2. Each party submits to the non-exclusive jurisdiction of the courts of the Governing Jurisdiction.

27. Disputes.

27.1. Nothing in this **clause 27** prevents the Company or the Buyer seeking urgent injunctive or other interim relief from a court, or from continuing existing court proceedings.

27.2. It is a condition precedent to the commencement of any proceedings in any court in any jurisdiction (other than for urgent interlocutory relief) that the parties first follow the procedure referred to in **clauses 27.3, 27.4 and 27.5**,

27.3. A party claiming that a dispute has arisen out of or in connection with the Contract (**Dispute**) must provide the other party with written notice of the nature of the Dispute and the relevant facts.

27.4. In the first instance, the Dispute will be referred to the Representatives.

27.5. A meeting of the Representatives must be convened and held by the Company and the Buyer as soon as reasonably practicable to attempt to resolve the Dispute.

27.6. If a Dispute is not resolved within 20 days after the issue of a notice under **clause 27.3**, either party may commence court proceedings for the resolution of the Dispute.

27.7. Each party must bear its own costs of complying with this **clause 27**.

28. Drawings and Information.

28.1. Unless the Contract provides otherwise, all drawings and information issued by the Company remain the property of the Company and may not be distributed or copied without the Company's permission.

28.2. All drawings, descriptive and shipping specifications, performance claims and capability claims given by the Company in the Quotation or contained in any catalogue, website or other publication are approximations only, do not form part of the Contract and the Company does not warrant the accuracy or completeness of any such information, unless expressly guaranteed in the Contract.

29. Third Parties

Nothing in the Contract confers or purports to confer on any third party any benefit or rights to enforce any term of the Contract.

30. Waiver

31. Waiver of any power or right under this agreement must be in writing signed by the party entitled to the benefit of that power or right and is effective only to the extent set out in that written waiver.

32. Force Majeure

The Company will not be liable for failure to perform its obligations under the Contract to the extent and for so long as its performance is prevented or delayed by a Force Majeure Event provided that the Company gives notice to the Buyer of the delay and uses reasonable efforts to remedy the cause of the delay as soon as reasonably practicable.

33. Provision of Security

33.1. In the event that the Buyer requires the Company to provide to it security for its obligations pursuant to the Contract, the Company, if it agrees in its discretion to do so, will do so on the following terms:

33.1.1. the form of security will be at the Company's sole discretion and may be in the form of an insurance bond or bank guarantee;

33.1.2. the security amount will be no more than 5% of the Price;

33.1.3. the Company has sole discretion to nominate an expiry date for the security provided; and

33.1.4. the Buyer must reimburse the Company for any and all costs associated with and as a result of the security and such costs are in addition to the Price.

34. Guarantee.

- 34.1. This **clause 34** applies to the extent a Guarantor has been nominated under a Credit Account Application or a third party has agreed to guarantee the Buyer's obligations under the Contract.
- 34.2. In consideration for the Company entering into the Contract, the Guarantor unconditionally and irrevocably guarantees to the Company on the terms set out in this **clause 34**, the performance of the Buyer's obligations under the Contract, including payment of all money due under the Contract, whether or not on credit terms (**Guaranteed Money**). Without limitation:
- 34.2.1. if any Guaranteed Money is not paid when due, the Guarantor must immediately on demand from the Company, pay to the Company the money due in the same manner as that money is required to be paid by the Buyer under the Contract;
- 34.2.2. if the Buyer fails to perform any obligations under the Contract when they are due, the Guarantor must immediately on demand from the Company, cause the Buyer to perform its obligations under the Contract.
- 34.3. The Guarantor indemnifies the Company against any claim, action, damage, loss, liability, charge, expense, outgoing or payment suffered, paid or incurred by the Company in relation to:
- 34.3.1. the failure of the Buyer to perform its obligations under the Contract; or
- 34.3.2. the failure of the Guarantor to cause the Buyer to perform its obligations under the Contract.
- 34.4. This **clause 34** applies:
- 34.4.1. to the present and future amount of Guaranteed Money and the present and future obligations of the Customer under the Contract;
- 34.4.2. to the Contract, as amended, supplemented, renewed or replaced;
- 34.4.3. regardless of whether the Guarantor is aware of has consented to or is given notice of any amendment, supplement, renewal or replacement of any Contract to which the Buyer and the Company are a party or the occurrence of any other thing; and
- 34.4.4. irrespective of any rule of law or equity to the contrary.
- 34.5. This **clause 34** is:
- 34.5.1. a principal obligation and is not to be treated as ancillary or collateral to any other right or obligation; and
- 34.5.2. independent of and not in substitution for or affected by any other collateral security which the Company may hold in respect of the Guaranteed Money or the obligations of the Buyer under Contract.
- 34.6. This **clause 34** is enforceable against the Guarantor:
- 34.6.1. without first having recourse to any collateral security; and
- 34.6.2. whether or not the Company has made demand on the Buyer, given notice to the Buyer or any other person in respect of anything or taken any other steps against the Buyer or any other person.

35. Variation of Terms and Conditions.

- 35.1. The Company may at any time vary the Terms and Conditions applicable to future Orders and may notify the Buyer of these changes or provide any other notice of a variation of the Terms and Conditions, by publishing the revised Terms and Conditions or notice on its website.
- 35.2. If the Company publishes the revised Terms and Conditions on its website, the revised Terms and Conditions are effective from the effective date noted in the Terms and Conditions or the date of publication on the website, whichever is later.
- 35.3. If the Company publishes the revised Terms and Conditions on its website, it may (but is not obliged to) notify the Buyer that it has done so on any invoice or Order Confirmation.